Unjustified Enrichment and Family Law

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Abstract: Explores the extent to which the common law of unjustified enrichment continues to be of use in the break-up of cohabitation relationships even after the passage of the Family Law (Scotland) Act 2006.

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Unjustified Enrichment and Family Law

With the enactment of the Family Law (Scotland) Acts of 1985 and 2006 one might think that there was now no role for unjustified enrichment claims by one partner to a relationship against the other. But, as will be seen later, such claims may still have an important and useful role in family law cases.

The framework of unjustified enrichment was altered by the case of *Shilliday v Smith* 1998 SC 725. There the enrichment remedy of recompense was successfully invoked by an ex-cohabitant who recovered from her erstwhile partner the amount which she had spent on repairs and improvements being carried out on the house in which the couple had been living and the title to which was solely in the defender. The claim was based upon the principle of the *condictio causa data causa non secuta*: the *causa* or reason underlying the expenditure had been the pursuer's contemplation of marriage with the defender, with the house to become the matrimonial home; and this had been known to the defender. The break-up of the relationship meant that the *causa* failed to materialise, i.e. *causa non secuta*.

Post *Shilliday v Smith* the framework now in place goes something like this. Enrichment is unjustified and gives rise to a cause of action in three situations, to be distinguished by the way in which it was acquired. These are:

(1) when it has been the result of an intentional transfer, or deliberate conferral, of wealth from the impoverished pursuer to the enriched defender, but that transfer has involved

some invalidating element, as in the case of a mistaken payment. An example is provided by *Shilliday v Smith*, inasmuch as Shilliday transferred money to Smith to enable him to pay tradesmen's bills.

(2) when the enrichment has been imposed upon the enriched defender by the impoverished pursuer, as in cases of unauthorised improvements to land. In *Shilliday v Smith* the pursuer paid directly for some of the improvements; and

(3) when the enriched defender has taken the enrichment from the impoverished pursuer, as in the case of the unauthorised use of another's property. This does not seem to happen very often if at all in cohabitation cases.

In category (1) there are several actions (or *condictiones* derived from Roman law) which may lead to an enrichment being regarded as unjustified. At the heart of each *condictio* lies the concept of *causa*, the legally recognised purpose of the parties in effecting the transfer of wealth or other enrichment. Thus the *condictio indebiti* arises when the transfer was made to discharge a debt or obligation, but for some reason (e.g. error as to liability to the transferee) does not do so. The *condictio causa data causa non secuta* deals with the case where the transfer was made for a *future* purpose that subsequently failed to materialise (e.g. gift in anticipation of marriage which then does not take place). This is to be contrasted with the *condictio ob causam finitam*, where the transfer is made to achieve a present purpose but that purpose fails for a subsequently arising reason (for example, to perform a contract that is subsequently frustrated or, perhaps, as mentioned above in connection with *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117 (see p * of this issue), as a result of a cohabitation which has come to an end). The *condictio ob turpem vel iniustam causam* deals with the case where the purpose was illegal or immoral (e.g. a payment is made under an illegal contract). Finally, the *condictio sine causa* performs a sweeper role, picking

up cases where for some other reason there is no legal basis upon which the enrichment can be retained by the defender. So, as Lord Hope has repeatedly stressed in his opinions and speeches on this subject, the whole of the law of unjustified enrichment in cases of deliberate conferral rests upon the principle of lack of a legal basis justifying retention of the enrichment. Repetition, restitution and recompense are now to be seen as the remedies for the reversal of enrichments found to be unjustified. They give rise to personal claims and would not have priority if the enriched person became insolvent.

Three concepts operate to limit the scope of when an unjustified enrichment claim arises.

(1) Incidental benefits

If somebody does something for his own benefit which also incidentally confers a benefit on another, the former probably suffers no relevant loss; the latter's benefit did not cause him any extra expenditure. However, the mere fact that the pursuer carried out expenditure with a view only of his own interests will not always precludes recovery. Thus, for example, if I improve land in the honest but mistaken belief that it is mine I am acting for my own benefit; but this will not prevent me recovering for the enrichment of the true owner. Similarly, recovery has been allowed in cases of mixed motives, where the pursuer acted partly in her own interest, partly in that of the defender. The purpose of the expenditure is merely a factor, but a more important one is the *directness* with which the enrichment is created for the defender by the pursuer's activities.

(2) Subsidiarity

The idea that recompense is not available where there is another, unexhausted remedy available to the pursuer arose because the former was so wide that it needed to be kept within its proper bounds. This doctrine of subsidiarity has been cogently criticized.[1] The policy lying behind the requirement can be fulfilled by observing the other requirements of enrichment law itself: for example, that enrichments which have a legal basis, having been gained through contract or gift, are irrecoverable; or by working through the rules relating to recoverable enrichments arising from transfers, impositions and takings, which will generally ensure that enrichment is kept within bounds.

(3) Equity

Enrichment remedies are equitable in nature meaning that the court may take account of, and balance, all factors affecting the relationship between the parties before deciding to order the restoration of or payment for enrichment. The overall equities of the case may mean that the enrichment stays where it is, even though all the positive requirements for recovery are met.

The Family Law (Scotland) Act 2006 does not explicitly prevent the common law from applying to any of the situations within its purview; nor, it is submitted, should enrichment claims be seen as subsidiary to, or excluded, by the existence of the statutory ones. So at the very least enrichment law will continue to provide an alternative claim for a cohabitant. But in practice it is very likely that claims will be brought under sections 26 to 29 of the 2006 Act. Enrichment law does not

[1] Evans-Jones, *Unjustified Enrichment*, ch 1.98-99; Whitty, (2006) 10 Edin LR 113.

provide any very obvious way to a larger claim; and the Act, while by no means free of difficulty, is a more direct route to the issues at stake between the parties than the common law concepts of *causa* and error and the choice between the various available *condictiones* in the kinds of case to which they are relevant.

None the less, there still seem to me to be gaps left by the Act into which enrichment law might still insert itself:

- Cases where there is doubt about whether the parties are or were cohabitants within the meaning of the Act. Here pleading an alternative common law case based on unjustified enrichment would seem a prudent precaution.
- Cases where parties live together, but not as husband and wife or as civil partners.
- Cases where the time limits of the act have been exceeded, in particular the one-year period for a section 28 claim. A common law claim will only prescribe five years after it becomes enforceable.[2]
- Cases where a deceased cohabitant has made a will containing no provision for the other party, who has nonetheless made a significant contribution in some way to the deceased's patrimony.

[2] See Prescription and Limitation (Scotland) Act 1973, Sch.1, para 1 (b) See *NV Devos Gebroeder v Sunderland Sportswear Ltd* 1990 SC 291; *McCafferty v McCafferty* 2000 SCLR 256; *Harris v Sales' Exrs* 2003 GWD 7-186.

Other family law situations include:

- Recovery of expenditure already incurred by a fiancé(e) or his or her parents on a planned wedding if the other calls it all off.
- A relative or friend who has looked after a person during their last years in the expectation of a substantial legacy which does not materialise on the person's death. Of course, if an actual promise was made then any action should found on that, rather than unjustified enrichment.

In conclusion, it is perhaps of some interest to ask which of the new statutory rights would have applied in the cohabitation disputes that have come before the courts over the last fifteen years. All of the decided cases centred upon the home in which the parties had lived. So each would now be the subject of a section 28 claim to a capital sum (none involved children, so far as can be told). The court would have first to examine whether the defender derived economic advantage from contributions made by the applicant, and whether and to what extent the pursuer had suffered economic disadvantage in the interests of the defender. In *Grieve v Morrison* 1993 SLT 852 the pursuer M contributed the free proceeds of the sale of her previous flat to the joint purchase of a further flat. The defender G gained a half-share in the proceeds of the sale of the jointly owned flat although his contribution to its purchase was limited to a share in the repayment of a joint loan. In *Shilliday v Smith*, the pursuer laid out money on improvements to the defender's house in which the parties lived together. The defender's economic advantage lay in not having to pay for the improvements, and the increased value of his house, while the pursuer was economically disadvantaged by the amount she had spent. In *Moggach v Milne* 2005 GWD 8-107 the court would require proof of the pursuer's contribution, if any, to the defender's economic advantage in

owning a house of increased value, just as in the enrichment case. In *Satchwell v McIntosh*, the pursuer claimed to have contributed towards the purchase price of the defender's house in which they cohabited, and towards the refurbishment of the property; again the economic advantage was the increased value of the house.

In each case the defender's economic advantage, if any, would have to be offset by any economic disadvantage that party had suffered in the interests of the pursuer. Perhaps the easiest case in which to see this as a possibility is *Satchwell*, where the defender had for a period cared for the pursuer while he was suffering from multiple sclerosis. But it is not clear to what extent this involved specifically *economic* disadvantage, unless the pursuer laid out money on care, or turned down opportunities to increase earning capacity so as to remain available to the pursuer.

Finally, the pursuer's economic disadvantage in the interests of the defender has to be offset by any economic advantage gained by the pursuer thanks to the defender's contribution (which may be financial or non-financial). In cases where the parties have lived together in a house belonging to only one of them, the obvious advantage gained by the non-owner (as in *Shilliday*, *Moggach* and *Satchwell*) is living rent- or mortgage-free in the other's property for the duration of the cohabitation. In *Satchwell*, the pursuer may also have had an economic advantage in not having to pay for domestic care in respect of his multiple sclerosis.